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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-425

STATE OF NEW YORK,

Petitioner,

against

JOHN SUTTON AND RICHARD PELTZMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
Citation to the Opinions Below	1
Jurisdiction	2
Issues Presented	2
Constitutional Provisions	2
POINT I—The search warrant was properly issued	4
(a) The Reliability Of An Informer May Be Shown By The Fact That In The Past He Had Given Reliable Information	4
(b) There Was A Sufficient Showing Of The Reliability Of The Informer's Information	6
(c) There Was Probable Cause For The Issuance Of The Search Warrant	7
POINT II—The exclusionary rule should not be applied to cases where the search warrant appears valid on its face	8
POINT III—The Exclusionary Rule Is Applied In New York Solely As A Result Of The Mandate Of This Court	10
Appendix A—Opinion, New York Court of Appeals	12
Appendix B—Opinion of Appellate Division, Second Department	20
Appendix C—Opinions, County Court, Westchester County	25

TABLE OF CASES

	PAGE
Adams v. Williams, 407 US 143, 32 L.Ed. 2d 612, 92 SCt 1921 (1972)	9
Aguilar v. Texas, 378 US 108, 12L.Ed. 2d 723, 84 S.Ct. 1509 [1964]	4, 7
Giordnello v. United States, 357 U.S. 480, 2 L.Ed. 1503, 78 S.Ct. 1245 (1958)	7
Jones v. United States, 362 US 257, 4 L.Ed 2d 697, 80 S. Ct. 725 (1960)	4
Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961)	2, 10
Molinaro v. New Jersey, 396 U.S. 365, 24 L.Ed. 586, 90 S. Ct. 498 (1970)	5
People v. Loria, 10 N.Y. 2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961)	11
People v. Marshall, 13 NY 2d 28, 191 NE 2d 798, 241 N.Y.S. 2d 417 (1963)	8
People v. Nettles, 23 Ill. 2d 306, 178 NE 2d 361, cert. den. 369 US 853 (1961)	6
People v. Richter's Jewelers, 291 N.Y. 16, 51 N.E.2d 690 (1943)	10
Spinelli v. United States, 393 US 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969)	6
United States v. Harris, 403 US 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 [1971]	4
Weeks v. United States	2
Whitely v. Warden, 401 US 560, 28 LEd 2d 306, 91 SCt 1031 (1971)	9

STATUTES

PAGE

28 U.S.C. 1257(3) 2

U.S. CONSTITUTION

Amendment [IV.] 2

Amendment [V.] 3

Amendment [XIV.] § 1 3

OTHER AUTHORITIES

Fisch on New York Evidence § 1062, p. 515 6

Richardson on Evidence

§§ 14, 30 5

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No. .....

STATE OF NEW YORK,

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against

JOHN SUTTON AND RICHARD PELTZMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the captioned case *sub nom*, the People of the State of New York v. John Sutton and Richard Peltzman on the 7th day of June, 1973, which suppressed the evidence which formed the basis of the indictment.

Citation to the Opinions Below

The opinion of the New York Court of Appeals is reported at —— N.Y.2d ——, —— N.E.2d ——, N.Y.S. —— 2d —— (Appendix A).

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department is reported at 38 A.D.2d 567, 328 N.Y.S.2d 334. (Appendix B).

The opinions of the County Court, Westchester County are unreported. (Appendix C).

Jurisdiction

The suppression of the evidence by the New York Court of Appeals is a determination by the highest State Court in which a decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), the petitioner claiming rights, privileges and immunities under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

Issues Presented

1. Should the exclusionary rule be limited to searches without a warrant and warrant cases where the warrant is patently bad?

2. Is a police officer's execution of a search warrant that appears to him to be valid on its face but which is subsequently found on appeal from conviction to be lacking in probable cause so unlawful as to require suppression of the fruits of the search under the principle of *Weeks* v. *United States* and *Mapp* v. *Ohio*?

3. Did the New York Court of Appeals err in its interpretation of the decisions of this Court when it held that the reliability of an informant's information is not shown when there is set forth a basis for believing him, i.e., that he gave prior reliable information and the information given by him is set forth in detail?

CONSTITUTIONAL PROVISIONS

AMENDMENT [IV.]

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

POINT I

The search warrant was properly issued.

(a) The Reliability Of An Informer May Be Shown By The Fact That In The Past He Had Given Reliable Information.

Probable cause for the issuance of a search warrant may be found on the hearsay statement of an informant (alone) provided there are sufficient grounds shown for the magistrate to conclude that his "present information is truthful (and) reliable." (*United States* v. *Harris,* 403 US 573, 29 L.Ed. 2d 723, 91 S. Ct. 2075 [1971].) In reaching such determination, the magistrate must first determine that there is a basis shown from which he can conclude that the informant is a "truthful" person and that there is a basis for concluding that the information supplied is "reliable." (*Aguilar* v. *Texas,* 378 US 108, 12 L.Ed. 2d 723, 84 S. Ct. 1509 [1964].)

The "truthful(ness)" of an informer may be shown by the fact that in the past he gave "accurate information" (*Jones* v. *United States,* 362 US 257, 4 L.Ed. 2d 697, 80 S. Ct. 725 [1960]). While the accuracy of the prior information and hence an informant's reliability, may be shown to a certain extent by the fact that it led to an arrest and conviction, that fact is only *indicative* of the accuracy of the information,[1] but yet is uniformly accepted by the courts in determining an informant's credibility. When the prior information given by the informer, upon

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[1]An informant may have told an officer he had seen heroin in A's apartment and the officer, based upon his observations, obtained and executed a warrant, finding only a package of flour and a gun. Upon conviction of A for possession of a gun, it could quite accurately be said that the information, as it was used to secure the warrant, led to the arrest and conviction of A and yet, as the informant mistook flour for heroin, the information was not reliable, and did nothing to show the informant's reliability.

which his credibility is predicated is set forth, there can be no question of its reliability and such will be more probative in assessing his credibility.

In the instant case, as stated in the affidavit, the informer, on September 13, 1969, telephoned Stanley Coon and had a conversation relative to drugs and the availability of purchasing a quantity of marijuana and on September 15, 1969 introduced an undercover police officer to Coon. As a result, the officer was able to purchase one-half pound of marijuana from Coon, who was subsequently indicted for Criminal Sale of a Dangerous Drug in the Third Degree and Criminal Possession of a Dangerous Drug in the Third Degree. The majority of the New York Court of Appeals found that the credibility of the informer was not shown because there was no statement that Coon had been convicted. Coon has been a fugitive since shortly after his arrest and cannot be tried unless and until he is apprehended.[2] The law would be strange indeed if the reliability of the informant's information were to hinge solely on the apprehension of a man who subsequently became a fugitive.[3] (Compare: *Molinaro* v. *New Jersey*, 396 US 365, 24 L.Ed. 586, 90 S. Ct. 498 [1970].) The fact remains: the informant gave reliable information about the availability of a large quantity of marijuana and by so doing proved his credibility.

There was set forth a sufficient basis from which the magistrate could determine that the informer was a truth-

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[2] Judicial notice could be taken by the County Court of the action pending therein and such notice could be taken by the appellate courts for the first time on appeal (§§ 14, 30, *Richardson on Evidence*).

[3] One might also consider a case where there was a verdict of guilty against the prior defendant and before sentence the defendant died. Under the New York law in effect at the time, there would be no judgment of conviction (471, CCP), and yet all that remained to be done was to impose sentence, a task completely unrelated to the reliability of the information given by the informer.

ful person; thus, it became necessary for the magistrate to determine whether his information was reliable.

(b) There Was A Sufficient Showing Of The Reliability Of The Informer's Information.

In a case such as the present where there is no statement that the informant personally observed the contraband, "the tip must describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." (*Spinelli* v. *United States,* 393 US 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 [1969]).

The sale and distribution of narcotics in large quantities is conducted with the utmost secrecy as the greater the number of persons with knowledge, the greater the chance of detection.

> "Because of (the) illegitimate nature of narcotics, they are sold for exorbitant sums on the black market and are therefore of great value to the person possessing them. Furthermore, since their mere possession may subject such person to severe criminal consequences, the narcotics traffic is conducted with the utmost secrecy and care."
>
> *People* v. *Nettles,* 23 Ill. 2d 306, 178 NE 2d 361, cert. den. 369 US 853. (1961)

In considering the reliability of the informant's information, the Judge was free to judicially recognize the nefarious manner of narcotic distribution (*Fisch on New York Evidence,* § 1062, p. 515).

The Judge was informed that on a prior occasion, the informer had been able to arrange the sale of one-half

pound of marijuana, a fact that clearly showed that he had substantial contact with higher level dealers. The Judge, also aware that large distributors deal only with persons who buy substantial amounts and even then only with customers known to them, as to do otherwise would substantially increase the risk of detection, could then consider the reliability of the information related by the informant. The conclusion is inescapable: the defendant was a distributor dealing only to large dealers and could only allow those persons to know that he had merchandise for sale. Thus, while the informer may not have received the information first hand, he received it from a highly reliable secondary source, a dealer in large quantities who had been advised of the receipt and availability of the merchandise.[4] Of course, no one other than a person who had seen the marijuana or one who was a potential large purchaser would know the exact quantity involved. The detailed information given by the informant was much more indicative of its reliability than the simple statement that he had seen marijuana in the defendant's apartment, a statement which would without doubt have been sufficient to support the issuance of a warrant.

(c) There Was Probable Cause For The Issuance Of The Search Warrant.

The magistrate, having determined that the informant was credible and his information reliable, next was charged with determining whether the affidavit set forth probable cause for the issuance of a search warrant. If there were sufficient facts set forth to warrant a reasonable person in

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[4] Of course if the information had been that the defendant had marijuana or even one ounce for sale, that information could have been obtained as a result of rumor circulated on the street and at that point, the other information would have to be carefully scrutinized to rule out such possibility. (*Aguilar* v. *Texas*, 378 US 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964); *Giordnello* v. *United States*, 357 US 480, 2 L.Ed. 1503, 78 S.Ct. 1245 [1958]).

believing that marijuana was probably present in the defendant's apartment, the warrant was properly issued.

> "Probable cause exists when there is reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated in the premises to be searched (*Carroll* v. *United States,* 267 US 132; *Dumbra* v. *United States,* 268 US 435; *Aderhold* v. *United States,* 132 F. 2d 858). It is not a matter for technical rules or tight and exact definition. The question always is: what in the common judgment of reasonable men would be regarded as good, sound cause, remembering that we seek only probable, not absolute cause?"
>
> *People* v. *Marshall,* 13 NY 2d 28, 191 NE 2d 798, 241 NYS 2d 417 (1963).

The magistrate, having received reliable information from a credible person that as recently as one and one-half hours earlier the defendant had a large cache of marijuana in his apartment, was certainly justified in concluding that there was probable cause for the belief that there was in fact marijuana present therein, and thus that a search warrant should issue.

POINT II

The exclusionary rule should not be applied to cases where the search warrant appears valid on its face.

The Constitution prohibits only unreasonable searches, but what is an unreasonable search and what sanctions should be employed by the Courts to prevent such has been a constant source of judicial conflict. If a search warrant is issued, it must be based upon an affidavit setting forth probable cause and particularly describing the place to be searched and the things to be seized; yet, if a search

is conducted incident to a lawful arrest, it is reasonable even though there be no probable cause to believe that weapons or evidence which may be destroyed will be discovered, provided there is probable cause for an arrest.

Recognizing that it is desirable to have the intervening determination of a magistrate of probable cause, the Courts look more favorably on an arrest or search conducted under a warrant; yet the validity of the warrant and hence the officer's action may not be determined until many years later on direct or collateral review (Compare: *Whitely* v. *Warden,* 401 US 560, 28 LEd 2d 306, 91 SCt 1031 [1971]; *Adams* v. *Williams,* 407 US 143, 32 L.Ed. 2d 612, 92 SCt 1921 [1972]). The exclusionary rule is not required by the Constitution, but has been fashioned by the Courts to deter illegal police conduct; police conduct which is found proper until many years later when that determination is overruled by a divided court is neither illegal nor unreasonable and is not the proper subject of the exclusionary rule.

Even in a close case, the exclusionary rule might properly be applied to any search without a warrant as to do so will encourage police officers to make an application to a magistrate for a warrant. If a warrant is issued based upon what reasonable judges may differ in their views as to be probable cause, there is no logical reason for the exclusion of the evidence seized.

Where there is room for judicial disagreement as to the validity for a search warrant, the application of the exclusionary rule is an irrational procedure. The only reason ever given in support of the application of the exclusionary rule is that it will deter illegal police conduct. If the courts cannot agree as to whether or not a warrant is valid, certainly it cannot be said that the execution thereof by a police officer is illegal or that by excluding the evidence seized, a police officer will be deterred from future violations of the Fourth Amendment. While the Constitution prohibits unlawful searches and seizures, it does

not prohibit the use of that evidence on trial; therefore, a ruling years later that an apparently valid warrant did not meet Constitutional muster should not mandate the exclusion of the evidence seized.

In the instant case fourteen judges have reviewed the affidavit in support of the warrant, and eight have found it to have been sufficient to support the issuance of the search warrant. The officer who executed the warrant cannot be said to have acted unlawfully in executing the judicial process which appeared to him to be valid on its face. If the exclusionary rule is designed to prevent future conduct of like sort, the only lesson to be learned by the officer is that he should not execute any search warrant until the highest courts of the State and Nation have ruled that the warrant was properly issued. This was never the intent of the Courts and thus there is no rational basis for the application of the exclusionary rule to evidence seized under an apparently valid search warrant.

POINT III

The exclusionary rule is applied in New York solely as a result of the mandate at this Court.

Until mandated by the decision of this Court in *Mapp* v. *Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 [1961] the New York Courts did not apply the exclusionary rule (*People* v. *Richter's Jewelers*, 291 N.Y. 16, 51 N.E.2d 690 (1943), and were it not for that mandate would not apply the rule.

> "We have examined the several contentions urged upon us by defendant, and, were it not for subsequent decision of the Supreme Court of the United States in *Mapp* v. *Ohio* (367 U.S. 643), rendered June 19, 1961, we would likewise affirm on the authority of such cases as *Wolf* v. *Colorado* (338 U.S. 25); *People* v. *Richter's Jewelers* (291 N. Y. 161); *People* v. *Defore* (242 N. Y. 13, cert. den. 270 U. S. 657); *People* v. *Adams* (176 N.Y. 351, affd. 192 U. S. 585). In *Mapp*, however, the Supreme Court overruled its former holdings, such as *Wolf*

v. *Colorado* (supra), and announced a new rule, deciding—for the first time—that evidence obtained by search and seizure in violation of the Fourth Amendment, made applicable to the States through the due process clause of the Fourteenth, is inadmissible in a State court.

"There can be no doubt that it is the duty of State courts to follow the *Mapp* holding in all trials taking place after June 19, 1961."

People v. *Loria*, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).

As is apparent from an examination of the decision of the Court of Appeals in this and other search and seizure cases, the New York courts have never independently found that illegally seized evidence must be suppressed.

Under State law, the State statutes provide a procedural means for following federal law as is clear from their failure to set forth a statutory standard of proof, the Legislative intent being merely to follow federal substantive law. Accordingly, the suppression ordered here cannot be said to be based upon an independent state ground, the citation of authority in the case itself clearly indicating this.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Appendix A

Opinion, New York Court of Appeals.

2. No. 431. 72

The People &c.,

Respondent,

vs.

John Sutton and Richard Peltzman,

Appellants.

MEMORANDUM:

We reverse on the dissenting opinion at the Appellate Division, noting in particular the absence in the affidavit on which the warrant here was issued of any indication of the sources of the informant's belief, whether on personal knowledge or otherwise.

GABRIELLI, J. (dissenting):

I dissent and vote to sustain the issuance of the warrant, the validity of the search and the seizure of a substantial quantity of dangerous drugs. The warrant was issued by the magistrate upon valid, legal and entirely adequate supportive evidence obtained from a source which had been demonstrated to be reliable.

Defendants were arrested for possession of these drugs following a search authorized by a warrant therefor based on the affidavit of a Detective of the Town of Greenburgh Police Department which in pertinent part recited that:

> "On April 24, 1970, at 3:40 P.M., I received information from a reliable Informant, whose reliability has resulted in the arrest of a person for the criminal sale of dangerous drug in Westchester County. This informant advised me that on April 23, 1970, sometime

after 8:30 p.m., the aforesaid subject of this warrant, John Sutton, came into possession of thirty (30) Kilos of marijuana. Said marijuana being in 'brick blocks' and that the marijuana has as recently as twelve noon this date, April 24, 1970 been secured in the aforesaid apartment number being 716, located at 80 East Hartsdale Avenue, Hartsdale, New York.

The reliability of the aforementioned Informant is predicated in [sic] information I received from Chief Criminal Investigator Charles R. Jackson, Jr., Westchester County Sheriff's Office, Narcotic Enforcement Unit, that on November 13, 1969, this said Confidential Informant did contact by telephone, one Stanley Coon, of 160 Virginia Road, Town of New Castle, New York, and did have a conversation relative to drugs and the availability of purchasing a quantity of marijuana. On November 15, 1969, this same Informant together with Criminal Investigator Kenneth Cowan, Westchester County Sheriff Office, Narcotic Enforcement Unit, did meet with the aforesaid Stanley Coon and purchased a half a pound of marijuana resulting in the indictment of Stanley Coon for criminal sale of a dangerous drug in the third degree and criminal possession of a dangerous drug in the third degree, and that on January 26, 1970, the aforesaid Stanley Coon was taken into custody for the aforesaid charges. Further at the time of the search the subject was found to be in possession of narcotic implements, and dangerous drugs, and a quantity of fireworks.

It is apparent that John Sutton, is a supplier of marijuana and has a supply of marijuana in his apartment, herein as apartment 716, located at 80 East Hartsdale Avenue, Hartsdale, New York."

Even a casual reading of the quoted affidavit discloses, without possible doubt, that the reliability of the informer

was clearly established. The sole dissenter in the Appellate Division and the majority here have, however, concluded that the search warrant suffered from a lack of evidence of the reliability of the informer for, as one argument they advance, it was not shown that the informer's previous disclosure resulted in a conviction. Although it will later be demonstrated that reliability was otherwise shown, it may be well to here repeat what Chief Judge Friendly said in *United States* v. *Manning* (448 F. 2d 992, 999 fn. 3): "A principle requiring suppression of evidence in any case where probable cause depended in part on information given by an informer whose reliability had not previously been established by a record of convictions would mean that he could never qualify except when his information was supplemented by evidence sufficient to establish probable cause without it". The quality of justice should not be so strained as would be required by the majority.

The Fourth Amendment to the United States Constitution requires only that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" and it is clear that "(i)n assessing probable cause for the issuance of a search warrant, the established test is whether the facts submitted in the supporting affidavit, would justify a man of reasonable caution in believing that an offense is being committed (*United States* v. *Rich,* 407 F. 2d 934, 936; cert. den. 395 U.S. 922; see also *United States* v. *Melancon,* 462 F. 2d 82). An examination of the affidavit supporting the issuance of the warrant, upon these guidelines easily substantiates its validity for, as the Supreme Court has stated, "(i)n dealing with probable cause * * *, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life

on which reasonable and prudent men, not legal technicians act" (*Brinegar* v. *United States*, 338 U. S. 160, 175).[1]

The dissent at the Appellate Division, upon which the majority of this court relies, has referred to *Spinelli* v. *United States* (393 U. S. 410), *Aguilar* v. *Texas* (378 U. S. 108) and *People* v. *Hendricks* (25 N Y 2d 129) and has chosen, with an unjustified exercise of judicial side-stepping, to give only passing notice to the more recent pronouncements in *United States* v. *Harris* (403 U. S. 573, *supra*) and the Second Circuit holding in *United States* v. *Manning* (448 F. 2d 992). In the *Harris* case, the Supreme Court reconsidered its prior decision in *Aguilar* v. *Texas, supra,* and *Spinelli* v. *United States, supra,* and redefined the issues to be resolved by a court reviewing the action of a magistrate in issuing a search warrant. Chief Justice Burger in announcing the decision of the court stated that the sole inquiry is, "as it always must be in determining probable cause whether the informant's *present* information is truthful or reliable * * *" (emphasis original) (p. 582). He added that an averment of an informer's previous reliability is not always necessary, and went on to state that *Aguilar* v. *Texas, supra,* cannot be read as establishing a principle of review other than whether there is a "substantial basis" for crediting the statement of the informant (p. 581). The extent of the court's consideration of its prior decisions in the *Spinelli* and *Aguilar* cases is revealed by the concurring opinion of Justice Black wherein he stated that both of these decisions should be overruled.

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[1] In speaking to this concept and citing this case with approval Chief Justice Burger, writing for the majority, redeclared the validity of this principle which applies especially to such a proceeding "before the trial" and hence "we deal only with probabilities" upon which reasonable men act (*United States* v. *Harris*, 403 U.S. 573, 582-583).

Appendix A.

In *United States* v. *Manning, supra,* the Second Circuit relied on the *Harris* case, and implied it had wrought a change in this area of the law and that had the lower court had the benefit of that decision, the case would have been decided differently. The court further observed that the lack of a previous *record* of accurate information by an informer, is not fatal to the issuance of a search warrant (p. 999).

Nonetheless, and apart from the holdings of these two cases, the affidavit under attack in this case, meets adequately the constitutional standards previously required, and probable cause was apparent from the face thereof. Even under *Aguilar* v. *Texas* (378 U. S. 108, *supra*) the two-prong test there required was met, since it was clearly shown by the underlying circumstances described in the affidavit that (1) the officer could reasonably conclude that the informant was credible and that (2) the narcotics were where he claimed they were.

The sole test of reliability is not, of course, whether previous information given resulted in an arrest and conviction,[2] but rather whether the underlying circumstances and statements in the affidavit, taken on their face, permitted the officer to conclude that the information was credible. Here, the informant had previously furnished information and cooperated with the police and, as a result, Stanley Coon was arrested and indicted, and a quantity of the marijuana was seized. In *People* v. *Montague* (19 N Y 2d 121) this court sustained the reliability of an informant

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[2] Reliability has been found where the informant's previous information led to an arrest and conviction (*People* v. *Munger,* 24 N Y 2d 445), where the informant was a police officer (*United States* v. *Ventresca,* 380 U. S. 102) and a number of situations other than proof of prior conviction evidence (e.g. *United States* v. *Harris,* 403 U.S. 573, 583-584; *People* v. *Wheatman,* 29 N Y 2d 337; *People* v. *Coffey,* 12 N Y 2d 443).

on somewhat similar facts. In an opinion by Judge Burke, the majority of the court concluded that the informant's credibility was established by his participation in a prearranged scheme, of which the police department had prior knowledge, and which was designed to result in the purchase of marijuana from the defendant Montague. After purchasing the marijuana, the contraband was turned over to the police, and on the basis of these facts this court concluded that the reliability of the informant was sufficiently established. It was impossible to buttress the informant's information in this case, by proof of Coon's conviction. He has absconded and is a fugitive from justice.

We further note with approval *Johnson* v. *Maryland* (14 Md. App. 721, 288 A. 2d 622; cert. denied 41 L W 3313) in which the Maryland Court of Special Appeals concluded, in answer to similar arguments requesting that convictions follow arrests before reliability may be established, that:

> "We feel that the last sentence of the first quoted paragraph in the affidavit, which related that the informant had given information and actively participated in investigations resulting in over five narcotic arrests and seizures within the preceding six months, was adequate for the issuing magistrate to conclude that the informant was credible" (*Johnson* v. *Maryland*, 288 A. 2d 622, 626-27).

Similarly the Fifth Circuit in *Albitez* v. *Beto* (465 F. 2d 954) sustained the reliability of an informant on the ground that previous information he had given had led to an arrest and the seizure of heroin, even though that prosecution was still pending.

Of course the second prong of the test in *Aguilar* v. *Texas* (378 U. S. 108, *supra*) is satisfied when the affidavit described the criminal activity in sufficient detail so that

the magistrate may know that he is relying on something more substantial than a casual rumor.

The defendant, citing *Aguilar* v. *Texas* (378 U. S. 108) and *Spinelli* v. *United States* (393 U. S. 410) advances the claim (the principal argument upon which the majority bases its reversal) that the affidavit in support of the search warrant was insufficiently explicit in detailing the source of the informant's information. ". . . (a)n affidavit may be based on hearsay information and need not reflect the direct personal observation of the affiant" and the Magistrate must be informed "of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were" (*Aguilar* v. *Texas, supra* at p. 114). This may, and sometimes can only, be accomplishhed by detailing the criminal activity involved; and "(i)n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrae may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." (*Spinelli* v. *United States,* 393 U. S. 410, 416, *supra*). (See also *Draper* v. *United States,* 358 U. S. 307; *People* v. *Hendricks,* 25 N Y 2d 129, 136). Here the criminal activity was more than sufficiently detailed. The informant gave the officer completely explicit and detailed information. He told the officer that the defendant had obtained the marijuana after 8:30 the night before, that he had thirty kilos of the marijuana which was in brick blocks, gave its exact location and that as recently as three and one-half hours earlier, the marijuana had been in the defendant's apartment. Such specificity, even without personal viewing, is sufficient (cf. *Draper* v. *United States, supra; Spinelli* v. *United States, supra,* at pp. 416, 417). The fact that the

Magistrate was justified in relying on the accuracy of the informant's information was conclusively proven when the warrant was executed for, in his apartment, Sutton had two full bricks and three half bricks of marijuana. (See *People* v. *Meyers,* 38 A D 2d 484).

The facts furnished by the informer required prompt police action and the issuance of the warrant. A showing of the receipt of thirty kilos of marijuana meant simply that the sale of dangerous drugs was taking place. There is lawful and valid reason for the validity of this warrant and "(i)t will not do to say that warrants may not issue on uncorroborated hearsay. This only avoids the issue of whether there is reason for crediting the out-of-court statement" (*United States* v. *Harris,* 403 U. S. 573, 584, *supra*). Where, as here, the averments in the affidavit reflected a substantial basis for crediting the information, it is sufficient (*United States* v. *Ventresca,* 380 U. S. 102, 110, *supra; United States* v. *Banks,* 465 F. 2d 1235, 1241), and in arriving at the conclusion to sustain the search, we quote from *United States* v. *Ventresca, supra,* that:

> "In our view the officers in this case did what the Constitution requires. They obtained a warrant from a judicial officer 'upon probable cause, supported by Oath or affirmation, * * *'. It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community" (p. 112).

The order of the Appellate Division should be affirmed.

* * *

Order reversed and the orders of the County Court reinstated, in a memorandum. All concur except Gabrielli, J., who dissents and votes to affirm in an opinion in which Burke and Jasen, JJ., concur.

Appendix B

Opinion of Appellate Division, Second Department.

24. THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v. JOHN SUTTON and RICHARD PELTZMAN, Respondents.—Appeal by the People from two orders of the County Court, Westchester County, dated June 26, 1970 and October 6, 1970, respectively, the first granting defendant Sutton's motion to suppress certain articles seized in his apartment pursuant to a search warrant, and the second granting defendant Peltzman's similar motion as to the same articles and directing a hearing as to articles seized in his apartment. Orders reversed, on the law and the facts, and motions to suppress denied. The motions to suppress were granted by the County Court on the ground that the affidavit supporting the search warrant was inadequate. We believe this was error. In our opinion, the affidavit sufficiently established the credibility and reliability of the undisclosed informant and, moreover, "spelled out in sufficient detail circumstances from which a 'neutral and detached magistrate' could independently determine that probable cause existed for the warrant to issue" (*People* v. *Montague,* 19 N Y 2d 121, 123; see, also, *Aguilar* v. *Texas,* 378 U. S. 108; *People* v. *Maddox,* 24 N Y 2d 924). Munder, Acting P. J., Latham, Christ and Benjamin, JJ., concur; Shapiro J., dissents and votes to affirm the orders, with the following memorandum: The issue here presented is whether the affidavit in support of a search warrant was sufficient to establish probable cause. I believe that the County Court was correct in determining it was not. The affidavit of Detective Madry stated, in pertinent part: "On April 24, 1970, at 3:40 P.M., I received information from a reliable Informant, whose reliability has resulted in the arrest of a person for the criminal sale of dangerous drug [sic] in Westchester County. This Informant advised me that on April 23, 1970, sometime after 8:30 P.M., the aforesaid sub-

ject of this warrant, John Sutton, came into possession of thirty (30) Kilos of marijuana. Said marijuana being in 'brick blocks' and that the marijuana has as recently as twelve noon of this date, April 24, 1970 been secured in the aforesaid apartment number being 716, located at 80 East Hartsdale Avenue, Hartsdale, New York." The affidavit must meet the challenge of the two-pronged test set forth in *Aguilar* v. *Texas* (378 U. S. 108) and *Spinelli* v. *United States* (393 U. S. 410), that is, it (1) must establish that the informant was in fact reliable and (2) must show sufficient underlying circumstances as to how the informant came by his information in order to demonstrate its credibility. An analysis of the affidavit demonstrates that neither prong of the test was met. As there was no independent checking of the unnamed informant's information, his reliability may be established by the officer's sworn statement "that the informant is known to him and has in the past furnished information leading to the arrest and conviction of others" (*People* v. *Montague,* 19 N Y 2d 121, 122; *People* v. *Hendricks,* 25 N Y 2d 129, 133; *People* v. *Rogers,* 15 N Y 2d 422, 424). The affidavit does not indicate that the informant was known to Detective Madry and his statement that the informant's information led to an arrest (as distinguished from a conviction) does not establish the informant's reliability (see *People* v. *Burnham,* 30 A D 2d 813, affd. 23 N Y 2d 809). Similarly, there has been no proper showing of the reliability of the informant's information. The information has not been set forth in such precise nature and great detail as would satisfactorily furnish a basis for a belief in its credibility (cf. *Draper* v. *United States,* 358 U. S. 307; *Spinelli* v. *United States, supra; People* v. *Boniface,* 37 A D 2d 728). Further, it is not clear that the informant was speaking from first-hand knowledge. It would be impermissible to presume that the informant had such knowledge in

the absence of an allegation to that effect (cf. *Giordenello* v. *United States,* 357 U. S. 480, 486; *People* v. *Hendricks,* 25 N Y 2d 129, 137). In *People* v. *Hendricks* (*supra,* see p. 133) the affidavit by the detective recited: "I have information based upon confidential information, from a previously reliable informant, that JOHN HENDRICKS has concealed on his person and in his residence at 97-20 72nd Drive, Forest Hills, New York a revolver for which he has no Pistol Permit and a quantity of jewelry and other property which are the proceeds of larcenies and burglaries in the New York area." Writing for a unanimous court, Judge Scileppi said, "It seems clear, without going further, that the affidavit in support of the warrant was insufficient to establish probable cause" (p. 133). He went on to say (pp. 136-137): "The People argue, however, that this language is sufficient because it can be presumed, when the language is given its ordinary meaning, that the informant *saw* the pistol alleged to be in defendant's possession. We cannot agree. The factual assertion by the informant in this case is no different from the informant's assertion in *Aguilar* that narcotics are being kept at the described premises. And neither does it differ from the informant's assertion in *Spinelli* 'that William Spinnelli is operating a handbook and accepting wagers' (*Spinelli* v. *United States, supra,* at p. 414). The case most directly in point, however, is *Giordenello* v. *United States* (357 U. S. 480). There Agent Finley of the Narcotics Bureau obtained a search warrant based upon an affidavit in which he stated: 'That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to wit: heroine hydrochloride with knowledge of unlawful importation' (*Giordenello* v. *United States supra,* at p. 481). In holding that the arrest and seizure pursuant to the warrant were illegal, the Supreme Court said: 'The purpose of the com-

plaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime. * * * The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon a finding of probable cause could be made. *We think these deficiencies could not be cured by the Commissioner's reliance upon a presumption that the complaint was made on the personal knowledge of the complaining officer.'* (*Giordenello* v. *United States, supra,* at p. 486; emphasis added.) It seems clear to us that, if it was impermissible in *Giordenello* to presume that the affiant, a Federal narcotics agent, was speaking from personal observation, it would likewise be impermissible in this case to presume that the hearsay informant had gained his knowledge firsthand. While courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a common sense, manner (*United States* v. *Ventresca,* 380 U. S. 102), the law is nevertheless clear that the Magistrate must be informed of some of the underlying circumstances which support the conclusion and belief of the affiant that his informer was credible and his information reliable. In short under both the Federal cases and our own State cases, this affidavit fails to pass constitutional muster." The affidavit in support of the warrant in this case suffers from the same infirmity which the court in *Hendricks* held nullified the warrant there, for here too the affidavit of the detective does not show that the informant saw the marijuana in the possession

of the defendants. For all that appears from the affidavit it may have been based on rumor, hearsay or surmise on his part. Under the circumstances, since the affidavit in support of the warrant failed to provide a basis for the belief in the informant's reliability and also failed to show how he had obtained the information with regard to the marijuana, I would affirm the orders.*

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* Although not cited by appellant, I am not unaware of the decisions in *United States* v. *Harris* (403 U. S. 573 [dec. June 28, 1971]) and *United States* v. *Manning* (448 F. 2d 992), which evince a tendency to relax the stringency of the requirements previously laid down to establish when the Government is entitled to rely upon an informant. However, even under the criteria there laid down, the affidavit used for the issuance of the warrant here is woefully deficient.

Appendix C

Opinions, County Court, Westchester County.

COUNTY COURT,
COUNTY OF WESTCHESTER.

[SAME TITLE]

BURCHELL, J.

The defendant, John Sutton, moves to suppress evidence on the grounds that it was seized pursuant to a search warrant issued without a sufficient showing of probable cause. There are several grounds of error urged here with respect to the validity of the warrant, but the Court need only allude to this one.

The search warrant, which was issued upon the affidavit of Greenburgh detective John Madry, recited that he had received information that on certain specified dates, defendant was in possession of marijuana at his apartment. In so far as is pertinent herein, the affidavit recites as follows:

"On April 24, 1970, at 3:40 P. M. I received information from a reliable informant, whose reliability has resulted in the arrest of a person for the criminal sale of dangerous drug in Westchester County. This informant advised me that on April 23, 1970, sometime after 8:30 P. M., the aforesaid subject of this warrant John Sutton, came into possession of thirty (30) kilos of marijuana. Said marijuana being in "brick blocks" and that the marijuana has as recently as twelve noon this date, April 24, 1970, been secured in the aforesaid apartment number being 716, located at 80 east Hartsdale Avenue, Hartsdale, New York".

Appendix C.

Although the information supplied by the informant described the drugs involved by weight and the fact that they were in the form of "brick blocks", no further allegations are set forth as to how the informer came into possession of this knowledge. The affidavit relates that the informer had recently supplied information which led to an arrest for the sale of drugs but there is no allegation made that the arrest resulted in a conviction for said crime.

The District Attorney argues that the warrant is sufficient because the informant was shown to have been reliable by having supplied information and arranging for the sale of drugs on a prior occasion. Additionally, the People argue that there was enough detailed information supplied by the informant to indicate credibility on his part.

The motion to suppress is granted.

The Court finds that the search warrant failed to meet the requirements laid down in *Aguiler* v. *Texas* (378 U. S. 108) and *Spinelli* v. *U. S.* (393 U. S. 410). Primarily, the informant was not shown to be reliable and secondly the magistrate could not infer from the information furnished that the informant was relying on "something more substantial than causal rumor" (*Spinelli* v. *U. S., supra,* at p. 416) nor was the data received from him so detailed as to import credibility or personal knowledge on his part. (*People* v. *Hendricks,* 25 N. Y. 2d 129). It is to be noted that Detective Madry had no personal knowledge of the facts alleged and no efforts were made to corroborate the tip provided by the informant (*People* v. *Coffey,* 12 N. Y. 2d 443, 452). The fact that he had provided information in the past leading to an arrest only, is not sufficient to show reliability (*People* v. *Burnham,* 30 A. D. 2d 813, aff'd 23 N. Y. 2d 809).

The Court finds therefore, that the affidavit in support of the warrant was insufficient to establish probable cause

and the warrant must fail for this reason. Accordingly, the items seized from defendant are suppressed as evidence.

The aforesaid constitutes the decision and order on the motion.

The District Attorney is directed to serve a copy of this decision and order, with notice of entry, upon defendant's counsel.

Dated: White Plains, N. Y., June 26, 1970.

/s/ George D. Burchell
GEORGE D. BURCHELL
County Court Judge

HON. CARL A. VERGARI,
District Attorney of Westchester County.

S. HENRY GRITT, Esq.,
Attorney for Defendant.

[SAME TITLE]

BURCHELL, J.

The defendant, Richard Peltzman, moves to suppress certain items seized pursuant to a search warrant issued by a Police Justice of the Town of Greenburgh. The items seized under this warrant form the basis for indictment No. 333/70. This Court, by its decision dated June 26, 1970, previously ruled that evidence seized from co-defendant Sutton's apartment under the authority of this warrant be suppressed. The Court's ruling applies equally to the defendant Peltzman who, by his presence in said apartment on the date of the warrant's execution, was

charged as a co-defendant under Indictment #333/70. Accordingly with respect to this indictment, the Court suppresses the items seized.

With respect to the evidence seized from defendant Peltzman's apartment, which forms the basis for Indictment #332/70, a hearing will be held immediately prior to trial to determine the legality thereof.

The aforesaid constitutes the decision and order on the motion.

The District Attorney is directed to serve a copy of this decision and order with notice of entry upon defendant's counsel.

Dated: White Plains, N. Y., October 6, 1970.

/s/ George D. Burchell
GEORGE D. BURCHELL
County Court Judge

HON. CARL A. VERGARI,
District Attorney of Westchester County.

BELLANTONI & GAVIN, Esqs.,
Attorneys for Defendant, Peltzman.

Appendix C.

SEARCH WARRANT.

COURT OF SPECIAL SESSIONS

TOWN OF GREENBURGH

In the Matter

of

THE APPLICATION FOR A SEARCH WARRANT FOR THE PERSON OF JOHN SUTTON AND FOR THE PREMISES OCCUPIED BY JOHN SUTTON AT 80 EAST HARTSDALE AVENUE, HARTSDALE, NEW YORK APARTMENT #716 AND FOR ANY OTHER PERSONS FOUND THEREIN AT THE TIME OF THE SEARCH.

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO ANY PEACE OFFICER IN THE COUNTY OF WESTCHESTER:

Proof by affidavit having been made this date before me by Detective John Madry that certain property, possession of which constitutes a crime, will be found on the person of a certained named individual and in the described location, and that the property may easily and quickly be destroyed and disposed of,

YOU ARE THEREFORE COMMANDED, at any time of the day or night to make a search of the apartment located at 80 East Hartsdale Avenue, Hartsdale, New York, and for the person of John Sutton who occupies the premise, and any other persons found therein, for the following personal property:

any narcotics or narcotic paraphernalia and money used to purchase narcotics, including but not limited

to heroin, and its derivatives, cocaine, marijuana, and any other narcotic, implements or instruments used to administer, package, prepare narcotics barbiturates, amphetamines, and other paraphernalia possessed in violation of the Public Health Law and the Penal Law of the State of New York.

and if you find same, bring it before a term of the Court of Special Sessions, Town of Greenburgh, New York. Sufficient proof having been given under oath that property sought to be seized will be removed or destroyed if not seized forthwith and there being probable cause that the said property can be easily and quickly destroyed or disposed of, the executing officer is not required to give notice of his authority and purpose prior to executing this order.

Dated: Town of Greenburgh, New York
April 24, 1970.

s/ Louis M. Galgano
Court of Special Sessions, Town of Greenburgh

Appendix C.

COURT OF SPECIAL SESSIONS

TOWN OF GREENBURGH

In the Matter

of

THE APPLICATION FOR A SEARCH WARRANT FOR THE PERSON OF JOHN SUTTON AND FOR THE PREMISES OCCUPIED BY JOHN SUTTON, LOCATED AT 80 EAST HARTSDALE AVENUE, HARTSDALE, NEW YORK, APARTMENT NUMBER 716 AND FOR ANY OTHER PERSONS FOUND THEREIN.

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

JOHN MADRY, being duly sworn deposes and says that I am a Detective assigned to the Greenburgh Police Department, Greenburgh, New York, and that I am presently conducting an investigation into the illegal possession and sale of narcotics within the Town of Greenburgh in violation of the Public Health Law and the Penal Law of the State of New York.

Based upon the facts hereinafter set forth, there is probable cause to believe that a search of the person of John Sutton and his premises known as Apartment 716, located at 80 East Hartsdale Avenue, Hartsdale, New York, and any other persons found therein, will reveal the possession of narcotics and dangerous drugs and related paraphernalia, possessed in violation of law.

On April 24, 1970, at 3:40 P.M., I received information from a reliable Informant, whose reliability has resulted

in the arrest of a person for the criminal sale of dangerous drug in Westchester County. This Informant advised me that on April 23, 1970, sometime after 8:30 p.m., the aforesaid subject of this warrant, John Sutton, came into possession of thirty (30) Kilos of marijuana. Said marijuana being in "brick blocks" and that the marijuana has as recently as twelve noon this date, April 24, 1970 been secured in the aforesaid apartment number being 716, located at 80 East Hartsdale Avenue, Hartsdale, New York.

The reliability of the aforementioned Informant is predicated in information I received from Chief Criminal Investigator Charles R. Jackson, Jr., Westchester County Sheriff's Office, Narcotic Enforcement Unit, that on November 13, 1969, this said Confidential Informant did contact by telephone, one Stanley Coon, of 160 Virginia Road, Town of New Castle, New York, and did have a conversation relative to drugs and the availability of purchasing a quantity of marijuana. On November 15, 1969, this same Informant together with Criminal Investigator Kenneth Cowan, Westchester County Sheriff Office, Narcotic Enforcement Unit, did meet with the aforesaid Stanley Coon and purchased a half a pound of marijuana resulting in the indictment of Stanley Coon for criminal sa'e of a dangerous drug in the third degree and criminal possession of a dangerous drug in the third degree, and that on January 26, 1970, the aforesaid Stanley Coon was taken into custody for the aforesaid charges. Further at the time of the search the subject was found to be in possession of narcotic implements, and dangerous drugs, and a quantity of fireworks.

It is apparent that John Sutton, is a supplier of marijuana and has a supply of marijuana in his apartment, herein as apartment 716, located at 80 East Hartsdale Avenue, Hartsdale, New York. Since marijuana may easily

and quickly be disposed of, it is requested that no notice of authority be required of the executing officer prior to the executing of the warrant.

WHEREFORE, your deponent respectfully requests that the Court issue a search warrant and order of seizure in the form annexed.

s/ JOHN MADRY,
DETECTIVE JOHN MADRY.

Sworn to before me this
24th day of April, 1970.
s/ LOUIS M. GALGANO,
COURT OF SPECIAL SESSIONS, TOWN OF GREENBURGH

I hereby certify that the property seized by me by virtue of the within warrant consists of the following:

Nine Hundred eighty six ($986.00) dollars in U. S. Currency, 1 scale, one brown leather pouch containing one tin foil wrapped white substance alleged to be heroin, one quantity of alleged hashish, one plastic bag containing 14 glassine envelopes of alleged heroin, 1 tin foil containing alleged heroin, two plastic bags and one plastic cup containing alleged marihuana, One brown handled saw, one brown and black pipe, one brown suit case containing two full bricks and three half bricks of alleged marihuana.

JOHN MADRY,
Detective, Town of Greenburgh P. D.